

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

MERCEDES-BENZ U.S. INTERNATIONAL, INC.)

(MBUSI))

and)

MICHAEL KIRK GARNER, An Individual)

) Case 10-CA-169466

POST-HEARING BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

This case involves one allegation challenging one sentence of Mercedes-Benz U.S. International, Inc.'s ("MBUSI") Cameras and Picture Taking Policy (the "Policy"), which requires employees seek permission before they record videos or take pictures at MBUSI. Complaint at ¶6. The Complaint does not allege that MBUSI applied the Policy in a discriminatory manner or that the Policy resulted in any actual interference with employees' Section 7 rights under the National Labor Relations Act ("NLRA"). *Id.* Rather, the Complaint alleges that the Policy *could* be interpreted to chill employees' exercise of Section 7 rights. MBUSI denies the allegation and denies that it engaged in any unlawful conduct.

Counsel for the General Counsel's ("CGC") case theory is that every camera rule requiring prior permission is unlawfully overbroad. But, the National Labor Relations Board ("Board") has never held that camera permission rules are *per se* unlawful. Indeed, the Board denied CGC's motion for summary judgment here for that reason, and camera permission rules have been found lawful in other cases. Rather, the Board has recognized -- while taking pictures may implicate Section 7 rights under certain circumstances -- those rights must be weighed against the employer's legitimate business objectives. Context is critical, but the CGC and this ALJ simply ignore the context. In balancing the Section 7 rights with an employer's business interests, the Board has held that protecting safety, production, confidential information and employee relations, *separately*, can justify work rules restricting employees' Section 7 rights. The same result must be reached here.

First, MBUSI has compelling business interests for the Policy that outweigh what are, at best, peripheral Section 7 rights (only recently the Board has announced that recording or picture taking potentially implicates Section 7 activity). MBUSI must protect employees from being injured, maimed or worse while at work. MBUSI must ensure its luxury vehicles are

manufactured efficiently without mutilation, quality defects or production delays. MBUSI must ensure trade secrets and other confidential information, worth hundreds of millions of dollars, is not disclosed to the public. MBUSI must preserve its work culture that provides the company a competitive advantage. With these business objectives in mind, the *undisputed evidence* establishes that MBUSI implemented the Policy, in furtherance of these compelling objectives, and that the Policy prevents potential significant interference with those objectives. The Board has recognized that the *potential* for interference with the business interests at stake here, *separately*, outweigh Section 7 rights; certainly, collectively they do.

Second, the only remaining issue is whether the Policy is properly tailored to the business interests being protected and it is. It is *undisputed* that important business interests needing protection are present in all parts of the property at all times. A “carve out” for specific conduct that is permissible could not, and would not, protect those interests. The up-to 8,000 persons present daily in MBUSI’s multi-employer, multi-cultural and multi-lingual facility cannot discern the myriad of circumstances in which camera usage could interfere with MBUSI’s business interests (when a picture, for example, would interfere with production or safety or contain confidential information). CGC’s only witness, a seventeen year employee, certainly could not. Importantly, MBUSI is not required to wait for devastating mistakes that lead to employee injuries, interference with production, lost employee morale and the disclosure of confidential information before implementing a common sense work rule. MBUSI’s Policy imposes a simple permission request that is easy to understand and apply. It does not forbid employees from exercising any Section 7 rights. Until this case, never had it been alleged that the long time Policy had interfered with any person’s rights.

Third, in the event the Administrative Law Judge concludes MBUSI's work rule is unlawful, the analytical framework used must be revised for camera permission rules. The National Labor Relations Act is not served by a standard that does not recognize that both employers and employees have an interest in clear and reasonable rules that protect vital business interests.

II. PROCEDURAL HISTORY

A. Case No. 10-CA-169466.

On February 11, 2016, MBUSI Team Member Kirk Garner filed an unfair labor practice charge ("charge") challenging MBUSI's Cameras and Picture Taking Policy (the "Policy"). (GX-1(a))¹. The charge did not allege that the Policy was applied in a discriminatory manner or resulted in any actual interference with Section 7 rights.

On April 11, 2016, the Regional Director issued a Complaint and Notice of Hearing ("Complaint"), pursuant to the charge. (GX-1(c)). The Complaint alleged that MBUSI's Policy violated Section 8(a)(1) of the National Labor Relations Act because it required proper authorization prior to taking pictures or making video recordings. (GX-1(c), ¶6). The Complaint, as the charge, did not allege that the Policy was applied in a discriminatory manner or resulted in any actual interference with Section 7 rights. On April 25, 2016, MBUSI timely filed an Answer, admitting the existence of the challenged Policy, but denied all the material allegations and asserted affirmative defenses. (GX-1(e)).

¹ In record cites, the transcript is abbreviated "T." After each cite, the page number and line of cite is listed. MBUSI's, or Respondent's exhibits are labeled "RX" and Counsel for the General Counsel's exhibits are labeled "GX."

B. The Board's Denial of Counsel for the General Counsel's Motion for Summary Judgment.

On May 10, 2016, the Counsel for the General Counsel ("CGC") filed a Motion for Summary Judgment with the Board arguing that MBUSI's Policy was unlawful on its face because the permission rule could be construed to chill employees' exercise of Section 7 rights. (GX-1(f)). MBUSI opposed the CGC's motion contending that employees would not have reasonably construed the Policy to prohibit Section 7 activity, that the Policy is justified based on legitimate business reasons, and that business justifications outweigh any purported adverse impact on Section 7 activity. (GX-1(j)).

On May 5, 2017 -- in a two to one decision -- the Board denied CGC's motion. (GX-1(l)).

The two Board members' majority opinion explained:

The Board has permitted employers to adduce evidence regarding asserted business justifications, and about whether the rules were communicated or applied in a manner that clearly conveyed an intent to permit protected activity...Because the Respondent has raised similar arguments here, we give the Respondent the same opportunity to adduce evidence at a hearing. Thus, contrary to our colleague's assertion, we find that the Respondent's arguments are sufficient, at least for purposes of avoiding summary judgment.

(GX-1(l), fn. 1).

C. Pre-Hearing Motions and Case Consolidation.

After CGC's motion was denied, the Acting Regional Director set the case for hearing on October 2, 2017. (GX-1(m)). Subsequently, the Regional Director in a September 25, 2017, order -- just days before the October 2017 hearing -- consolidated the underlying complaint with a complaint issued in Case Nos. 10-CA-197031 and 10-CA-201799 on August 31, 2017, against Mercedes-Benz Vans, LLC and MAU Workforce Solutions, (the "MBV/MAU Complaint"), alleged joint employers operating in Charleston, South Carolina. (GX-1(q)). MBUSI, MBV and MAU are completely separate legal entities in different states; the MBV/MAU Complaint

contains three unique allegations (solicitation, distribution and joint employer); and the only potentially overlapping allegations (a challenge to different camera usage rules) requires that each party proffer different witnesses, evidence and defenses. MBUSI, MBV and MAU moved to sever, (GX-1(u)-(v)), and CGC, in a subsequent filing² and at the hearing, explained that the “sole purpose” for consolidation was to have Administrative Law Judge Donna Dawson (“ALJ Dawson”) hear both cases.³ At the hearing, ALJ Dawson stated that she was “leaning toward granting the motion to sever because I really cannot see any benefit coming from” consolidation but would rule in “writing” at later date. (T 14:21-15:6). The motion to sever is still pending.⁴

On October 2, 2017, MBUSI filed a Motion to Dismiss, asserting ALJ Dawson did not have the authority to preside over this matter because her appointment violated the Appointments Clause of the United States Constitution. (GX-1(cc)). At the hearing, ALJ Dawson ruled that she would hold that motion in “abeyance” until she had “receiv[ed] written responses and briefings on that matter” from CGC. ALJ Dawson directed CGC to brief the issue in his post-hearing brief. (T 16:5-8). The motion is still pending.

On October 2, 2017, MBUSI also filed a Motion for Protective Order to protect the confidentiality of its sensitive business, commercial and proprietary information. (GX-1(aa)). CGC did not file a written response. MBUSI argued that a Protective Order was necessary so it could properly present evidence to support its defenses. (T 25:8-14). At the hearing, ALJ

² CGC’s Opposition did not address, let alone refute, MBUSI’s arguments in its Motion to Sever and simply stated “the cases have been consolidated only to the extent that the same Administrative Law Judge will hear both cases.” (GX-1(w), pg. 1). On October 2, 2017, MBUSI and MBV/MAU, respectively, filed Replies to the Opposition. (GX-1(y)-(z)).

³ On September 29, 2017, ALJ Dawson issued an “Order Denying Request for Expedited Hearing” but did not rule on whether consolidation was proper or not. (GX-1(x)).

⁴ To the extent necessary, MBUSI reasserts its arguments raised in its Motion to Sever and Reply to CGC’s Opposition.

Dawson denied MBUSI's motion -- even prior to CGC making an opposition argument (T 20:23-25) -- stating, "I don't know that I need to see any proprietary information that -- or hear necessarily, the details of any proprietary information that would be presented...I think it's enough to have evidence and testimony that this is what you do." (T 17:25-18:2, 19:3-4).

D. Hearing.

A two-day hearing on the Complaint took place in Birmingham, Alabama, on October 3-4, 2017, before ALJ Dawson. CGC called one witness, Charging Party Kirk Garner. ALJ Dawson precluded MBUSI's counsel from, on cross examination, inquiring into certain topics on relevance grounds⁵, stating, "his experiences are not relevant to the legal question in this case." (T 138:1-2). MBUSI submitted an offer of proof but ALJ Dawson rejected the offer of proof "mainly on relevancy" grounds and in regard to any "legal conclusions" made and designated the offer of proof as a rejected exhibit (RX-37).

MBUSI's counsel called Human Resources Manager, Jeff Burbank. MBUSI and CGC stipulated to offers of proof for three witnesses, Senior MBUSI Manager QM/EVS Hans Crouse, Head of Product Management with Mercedes Benz USA Bernie Glaser and Senior MBUSI Manager for Plant Controlling Mike Mashburn. (RX-40, RX-41, RX-42). MBUSI also proffered three expert witnesses: Bill Petty, a lean manufacturing production expert, to testify about camera usage impact on production in manufacturing settings; Sepp Etterer, a safety expert, to testify about camera usage impact on safety in manufacturing settings; and Jonathon Halbesleben, a human resources expert, to testify about camera usage impact on employee relations in manufacturing settings. After MBUSI established each witnesses' expert qualifications (T 303:19-306:21, 311:18-313:24, 318:24-320:7, RX-26, RX-27, RX-30), CGC

⁵ T 92:2-4, 115:20-116:9, 122:1-4, 122:13-123:13, 131:12-132:4, 134:15-19, 136:1-13, 138:3-6, 152:2-9, 153:16-155:6, 169:17-22, 170:3-10, 174:13-175:1.

objected to their testimonies on relevancy grounds, and ALJ Dawson sustained the objections. However, MBUSI submitted offers of proof on their testimony, and ALJ Dawson accepted the same but designated the offers as rejected exhibits. (RX-39, RX-43, RX-44).

III. STATEMENT OF FACTS

A. MBUSI and Neutrality.

MBUSI operates an automobile manufacturing facility in Vance, Alabama, its sole vehicle manufacturing facility in the United States. (T 35:1-6; RX-41, ¶2). MBUSI maintains a policy of strict neutrality on issues of unionization. Indeed, recently an Administrative Law Judge held that MBUSI truly seeks to be a "neutral" employer. Mercedes-Benz U.S. Int'l, Inc., 361 NLRB 120 (2014). The question of whether or not to unionize is up to the employees ("Team Members"), themselves.

B. MBUSI's Manufacturing Facility and Workforce.

MBUSI builds over three-hundred thousand luxury vehicles annually in its manufacturing plant. (T 203:7-8; RX-41, ¶2). Up to 8,000 persons work at MBUSI on a daily basis, including around 3,600 Team Members and thousands of contractors, visitors and other third parties. (T 200:25-201:5, T 202:4-11). MBUSI is a multi-employer, multi-cultural and multi-lingual work environment. (T 258:23-259:14).

An individual arriving at the plant will generally drive through the gated property, park in MBUSI's parking lot, walk a short distance, pass through a security stand with a turnstile, traverse an open air area in front of the plant, then enter one of MBUSI's Atriums. (T 48:2-7, 199:6-11). MBUSI's cafeteria abuts the Atrium. The Atriums lead directly into the production area.

MBUSI's production area is over six million square feet and consists of two body shops, a paint shop and two assembly plants. (T 198:1-23). The production area consists primarily of

three interconnected areas: (i) assembly lines (basically, long conveyor lines on the floor); (ii) team centers or group centers; and (iii) logistics aisles. (T 198:25-199:5, 262:12-23). The assembly lines begin running on Sunday evening and effectively run continuously all week, twenty-four hours a day, using three shifts, except for scheduled breaks. (T 43:20-21, 200:20-24).

C. Foreign Trade Zone and MBUSI's Security.

MBUSI operates in a Foreign Trade Zone (FTZ). (T 209:20-23). A FTZ is a secure area under U.S. Customs and Bureau Protections ("Customs"), which, if certain requirements are met, provide the entity operating in the zone tax and other benefits. (T 210:11-14). Customs requires MBUSI, as a FTZ participant, to take sufficient security measures to control entry and exit of persons and property. (T 210:15-23). Further, a myriad of security issues arise from the thousands of persons visiting the location on a daily basis. (T 209:4-210:10; RX-13).

To ensure compliance with MBUSI's FTZ requirements and to protect its business interests, MBUSI has taken various security measures. (T 209:12-210:10). MBUSI has installed cameras throughout the property, and security guards are assigned to the facility twenty-four hours a day, seven days a week and patrol the grounds. (T 261:14-16; RX-41, ¶10). MBUSI requires that all persons working at the facility have "badges" and use those badges to enter and exit the facility with access limited based on the type of badge. (T 199:11-16, 199:24-200:10, 268:3-6). MBUSI also requires that all third parties without badges entering the facility sign in at the security desk, submit their driver's license to security for inspection and identify their vehicle. (RX-19). To protect its information systems, MBUSI has implemented advanced computer security safeguards to protect against, among other things, cyber attacks. (RX-42, ¶9). MBUSI security measures ensure that, at all times, it lawfully controls the entry and exit of persons on its property.

D. Daimler AG.

MBUSI's parent corporation is Daimler AG ("Daimler"), a multi-national and publicly traded company. (T 227:21-24). MBUSI is a contract manufacturer for Daimler. (T 227:24-25). Accordingly, MBUSI must compete with other Daimler manufacturers for the issuance of work from Daimler. (T 227:25-228:4). As part of its relationship, MBUSI is privy to and contractually obligated to protect Daimler's intellectual property, manufacturing secrets and confidential business information. (T 228:4-10; RX-40, ¶4). Daimler requires that MBUSI implement policies and regulations to protect Daimler's sensitive information including policies prohibiting photos/videos in the plant without permission. (T 228:11-19, 233:6-12, 233:20-23; RX-7, RX-8, RX-20; RX-40, ¶5). Daimler enforces photos/video prohibitions globally in all of its facilities. (RX-40, ¶5).

E. MBUSI's Cameras and Picture Taking Policy.

MBUSI's Cameras and Picture Taking policy ("the Policy") provides:

CAMERAS AND PICTURE TAKING

Cameras and video recording devices are not allowed without proper authorization and require approval by MBUSI Security and Communications Department prior to any photos or recordings being made. If you need photos or video recordings for any purpose, you must submit a Video Authorization Form to Security for review. If approved, a special Camera Approval Pass will be issued and must be worn at all times when the picture and video recordings are being made. Visitors taking pictures will require this approval as well as a MBUSI escort.

(RX-4). For over fifteen years, MBUSI has maintained and consistently enforced the Policy. (T 233:6-9, 245:3-22). Team Members are well aware of this Policy. (T 44:4-8, 44:19-22; GX-3). It has never been alleged, until the underlying unfair labor practice charge here, that the Policy ever interfered with Team Members' Section 7 rights. (T 265:8-12).

The Policy restricts all persons present on MBUSI's property from video recording and picture taking without permission. (T 212:12-23, 293:3-6; RX-13, RX-14, RX-19). The Policy is provided to all Team Members via MBUSI's handbook and all Team Members receive new hire training on the policy. (T 44:4-8, 212:20-23; RX-4, RX-14). MBUSI has disciplined violators of the Policy. (T 245:3-5). Visitors desiring to record videos or take pictures must receive a Camera Approval Pass and be accompanied by an MBUSI escort. (RX-4). Further, plant tour participants must, as a condition of participation, agree not to record or take pictures. (T 293:3-6; RX-19). The thousands of various contractors present daily must comply with the Policy and receive training that forbids unauthorized camera usage. (T 212:20-23; RX-14). All contractors must also (both the business and the business' individual workers) sign a Confidentiality Agreement to work at MBUSI, which forbids, *inter alia*, disclosure of MBUSI property and information through video recording and picture taking. (T 205:4-15, 207:2-17; RX-11, RX-12). The security guards' patrol orders specifically direct them to prohibit unauthorized camera usage. (T 211:5-8, RX-13). MBUSI's measures ensure that, at all times, persons will not take unauthorized video recordings or pictures.

F. Kirk Garner's Request for a Camera Pass.

On November 25th, 2015, MBUSI employee Kirk Garner, who works in the quality audit group, testified that he asked Team Relations Representative Roger Baird for an *open ended* camera pass to "take pictures of unfair labor practices and unsafe working conditions and audio" at work. (T 45:16-21, 48:12-15). On cross-examination, however, Mr. Garner explained that he sought a camera pass to document a contractor wearing blue jeans and a Team Member not wearing MBUSI team wear. (T 159:12-24). An individual not wearing MBUSI team wear is certainly not an "unfair labor practice," and it is not alleged that MBUSI has committed any

unfair labor practices related to team wear.⁶ The picture taking Mr. Garner requested would have presumably occurred on MBUSI's *production floor*. (T 159:17-21). Mr. Garner testified that Mr. Baird ultimately explained to him that he would not be given a camera pass under the circumstances but could voice any concerns through MBUSI's open-door policy. (T 50:8-10).

Mr. Garner testified that he subsequently asked MBUSI's Chief Executive Officer Jason Hoff to reconsider issuance of the camera pass, and the reconsideration request was also ultimately denied. (T 51:6-12, 80:13-15). Mr. Garner alleges that he told Mr. Hoff that "people were taking pictures with their camera phones, telephones with cameras on them, all over the plant and putting them on Facebook." (T 50:11-15). This statement was strange given that posting pictures on Facebook had never come up before (by either Mr. Garner or MBUSI), and the posting of pictures on Facebook had no relation to Mr. Garner's camera pass request (*e.g.*, he was not told it was the reason his request was denied). Mr. Hoff *purportedly* responded that he knew that some pictures had been posted on Facebook and that it was a "problem," emphasizing such behavior was not acceptable. (T 50:16-18). At no time was Mr. Garner threatened or coerced or treated in a rude or disrespectful manner.

In contrast to Mr. Garner's alleged hyperbolic statement to Jason Hoff (people were taking picture "all over the plant"), the evidence showed at the hearing that the limited pictures taken at MBUSI were isolated and sporadic. (GX-4 through GX-12). Mr. Burbank testified that he was not aware of any persons ever taking pictures at MBUSI for non-work purposes without a camera pass. (T 265:8-12). Likewise, Mr. Garner testified in his seventeen years of working at

⁶ Further, contractors do not wear team wear. Regardless, the contractor wearing blue jeans was corrected shortly after it was brought to MBUSI's attention. (T 160:2-17).

MBUSI he had *never* observed any video recording or picture taking that wasn't work related.⁷ (T 126:7-21).

At the hearing, CGC identified certain pictures purportedly taken in MBUSI's facility. (GX-4 through GX-12). That evidence merely shows that *over a seven year period, and in an over thirty-six hundred Team Member workforce*, only seven persons have taken and posted pictures. Only four pictures are from the production floor (three from the same team member) and those pictures contain, in the background, MBUSI's equipment (GX-4), vehicles (GX-5, GX-12) and *confidential* business charts (GX-6). Another picture is from MBUSI's office. (GX-7). The remaining four pictures are from MBUSI events (*e.g.*, a Christmas party, retirement celebration or a picture from a Nick Saban visit), one of which was posted by MBUSI to support breast cancer awareness.⁸ (GX-10). Mr. Garner did not testify that he was aware of any other Facebook posts of pictures taken at MBUSI.

The pictures are not relevant, except to show that picture taking was sporadic and isolated. CGC did not establish (1) that the pictures were authentic, (2) when certain pictures were taken⁹, (3) that the persons did not have camera passes, or (4) most importantly, that MBUSI management had knowledge of the pictures (except for the picture MBUSI had vetted and shared). MBUSI could not have addressed pictures of which it was unaware.

⁷ Ten years ago Mr. Garner did observe someone taking pictures but it was an MBUSI employee taking pictures as part of his job. (T 126:7-21).

⁸ MBUSI will, on occasion, take carefully staged pictures at its facility that it shares publicly to support its business interests. However, the picture taking and disclosure is carefully crafted to not interfere with MBUSI's business interests, including but not limited, disclosure of confidential information. (T 242:4-16). Further, for events where pictures must be taken, MBUSI will secure the area beforehand to protect its business interests. (T 288:9-289:20).

⁹ T 67:13-17, 68:1-3, 70:22-71:4, 73:21-25, 75:12-23; GX-4, GX-5, GX-7, GX-10, GX-11.

G. The Business Justifications for MBUSI's Policy.

MBUSI witness Jeff Burbank testified at length about the history, need for and application of the Policy. (T 233:6-19, 254:1-255:6, 259:15-260:4, 263:2-264:13). His undisputed testimony, along with the testimony of MBUSI's other witnesses and even the testimony of Mr. Garner, established that MBUSI's Policy protects several important business interests: (1) production, (2) safety, (3) disclosure of MBUSI's confidential information (including early disclosure of new vehicle designs), and (4) MBUSI's One Team Approach. (T 47:5-12, 233:6-19, 254:1-255:6, 259:15-260:4, 263:2-264:13; GX-3; RX-40, ¶¶5-6; RX-41, ¶21; RX-42, ¶8).

1. The Policy Prevents Distractions Which Lead to Production and Safety Issues.

The undisputed testimony established that camera usage leads to distractions. (T 254:1-23; RX-42, ¶16). It affects those (1) using a camera, (2) who are being recorded or having their picture taken and (3) who observe persons using a camera. (T 254:1-23). Distractions interfere with production and create safety risks. (*Id.*)

a. Distractions from Camera Usage Interfere with Production.

MBUSI manufactures hundreds of thousands of vehicles each year to customer specifications in one of the most sophisticated manufacturing facilities in North America. (T 203:7-8; RX-41, ¶2). The undisputed evidence establishes that workers distracted, even for a second, can have a negative impact on MBUSI's manufacturing process. (T 254:1-23, 255:7-10; RX-41, ¶17; RX-42, ¶16). MBUSI's Policy prevents distractions, which protects MBUSI's production. (T 263:2-12; RX-40, ¶5).

MBUSI's plant operates twenty-four hours a day, seven days a week, and moving equipment, parts, vehicles and working persons are present in all parts of the facility. (T 200:20-

24). Vehicles are built using lean manufacturing principles. (T 307:12-17; RX-41, ¶¶5, 8, 13). Lean manufacturing emphasizes eliminating the waste of time, materials, and capital. (T 307:12-22; RX-41, ¶13). Consistent with lean manufacturing, each vehicle is custom built -- with over a hundred-thousand different combinations possible -- which requires that Team Members complete a specialized job task in their designated zone on the moving line before that vehicle reaches the next work station. (T 119:5-13; RX-42, ¶¶13-14). The work requires constant attention from Team Members because the vehicles move along the assembly line fast. (T 117:13-16, 118:5-18). The stakes are high. (T 116:11-21). MBUSI has invested hundreds of millions of dollars and employs teams of engineers and other employees solely focused on ensuring production and vehicle quality. (T 246:16-248:3; RX-41, ¶¶7-8; RX-42, ¶4).

MBUSI has determined, and the undisputed evidence establishes, that camera usage at MBUSI would cause distractions compromising production. (T 254:1-23; RX-42, ¶16). Team Members not focused on their jobs will make more mistakes. Mistakes in production, *even those caused by a distraction of just a few seconds*, lead to quality defects, delays and waste. (T 255:7-10; RX-41, ¶16). Annually, waste from production mistakes cost the company *millions* (T 224:3-6, 226:11-22; RX-41, ¶¶16, 18-20), and a few minutes of lost production costs the company *tens of thousands of dollars*. (T 226:11-22; RX-41, ¶16). Production delays and mistakes can ripple through the production process. (T 146:18-22; RX-41, ¶17). In addition to production delays, mistakes can compromise the quality of MBUSI's premium luxury vehicles, which is unacceptable for MBUSI and its customers. (RX-41, ¶¶14-17; RX-42, ¶16). MBUSI must comply with National Highway Traffic Safety Administration requirements, and noncompliant vehicles lead to substantial fines from regulators and put customers and the public

at risk. (RX-42, ¶16). MBUSI has a compelling interest in protecting its production, and the Policy protects production. (T 233:6-12).

b. Distractions from Camera Usage Interferes with Safety.

On a daily basis Team Members make decisions that affect their safety and the safety of other ones; their decisions potentially implicate life and death. (T 116:11-21, 117:13-16, 118:19-22). The undisputed evidence establishes that persons distracted, even for a second, create safety risks. (T 254:1-23, 255:7-10; RX-41, ¶17; RX-42, ¶16). MBUSI's Policy prevents distractions, which improves safety.

Safety risks are present at all times (the plant operates twenty-four hours a day, seven days a week) and throughout the property. (T 116:11-13). MBUSI's industrial, fast moving workplace is busy, noisy and potentially dangerous to inattentive persons. (T 116:11-21). Team Members work in close proximity to moving vehicles (such as hysters and forklifts) and large robots and around sharp tools, moving equipment, chemicals, and other potential safety hazards that could inflict serious injury or death on someone. (T 116:22-117:12, 118:3-18). Likewise, on a daily basis MBUSI's parking lots accommodate thousands of persons and vehicles. (T 202:9-11, 262:3-5). To protect workers, MBUSI invests millions of dollars a year in safety, including safety training, on-site medical facilities, personal protective equipment, salaries for safety employees and reasonably implemented work rules (for example, electronic devices are prohibited in work areas). (RX-41, ¶12). Further, MBUSI is also self-insured for purposes of the workers' compensation act. (RX-41, ¶11).

In addition to a compelling need to protect worker safety, MBUSI must comply with the Occupational Safety Health Administration ("OSHA") or face legal exposure. (RX-41, ¶25; RX-42, ¶16). OSHA's general duty clause requires that employers keep their facility "free from

recognized hazards that are causing or are likely to cause death or serious harm,"¹⁰ which include implementing work rules to protect safety. Failure to comply with OSHA's requirements can lead to citations and fines. (RX-42, ¶16).

MBUSI has determined, and the undisputed evidence establishes, that camera usage at MBUSI would cause distractions that compromise safety and even could lead to OSHA violations. (T 254:1-23; RX-42, ¶16). One accident is one too many; significant injury or even death can **never be undone**. The safety risks are present *even if the distraction from camera usage is brief and even if it only arises a small percentage of the time*. (T 254:1-23). For example, a person walking anywhere on MBUSI's plant floor (on work time or not) who is briefly distracted by picture taking could be hit by "hysters" (a type of forklift) or "tuggers" (a large motorized vehicle that pulls part-wagons) that regularly move quickly up and down the logistics aisle transporting parts in the assembly area. (T 118:5-15). A person distracted by picture taking could be seriously hurt or even killed if hit by large robots that frequently move throughout the plant floor. (T 118:5-15). A similar outcome could occur in MBUSI's parking lots where thousands of vehicles come and go daily. (T 202:4-11, 262:3-5). Further, a person who decides to take a picture or record a video instead of immediately alerting MBUSI of a safety issue could compromise himself/herself and co-workers. (T 254:1-23). Permitting camera usage in the production floor would also lead to OSHA violations because camera usage is known to distract persons.¹¹ MBUSI has a compelling interest in ensuring Team Members safety, and the Policy mitigates safety risk. (T 254:1-23, 268:16-18).

¹⁰ 29 U.S.C. 654(a)(1).

¹¹ In addition to Jeff Burbank's testimony, the safety expert so testified. While ALJ Dawson determined his testimony was irrelevant, MBUSI made an offer of proof (which was designated as a rejected exhibit) and, as explained in Section III, H(1), the expert's testimony is relevant.

2. The Policy Prevents the Disclosure of Confidential Information.

The undisputed testimony establishes that video recording and picture taking can lead to the disclosure of MBUSI's and its parent corporation Daimler's (1) new vehicle information and (2) other confidential information located throughout the facility, which would cause both companies great harm. (T 233:6-12, 263:2-12; RX-40, ¶¶5-6).

a. Camera Usage Can Lead to the Disclosure of New Vehicle Information.

MBUSI manufactures over three hundred thousand cars a year. (T 203:7-8; RX-41, ¶2). The undisputed evidence establishes that premature release of new model information via video recordings or pictures would impact sales and provide MBUSI's and its parent corporation Daimler's competitors an advantage. (RX-40, ¶¶5-6, 10; RX-42, ¶10). MBUSI's Policy reduces the risk that confidential recordings and pictures of new vehicle will be disclosed. (T 263:2-12; RX-41, ¶¶21-22).

At almost all times new vehicles -- the details of which (including images and capabilities) have not been released to the public -- are present at MBUSI. (T 233:2-5; RX-42, ¶3). MBUSI manufactures four classes of vehicles¹² and will build upcoming electric vehicles. (T 229:5-9; RX-42, ¶2). Vehicles are constantly changing and evolving. Each of the four vehicles undergo yearly model changes. (T 230:2-4, 230:23-231:2; RX-42, ¶¶2-3). Each of the four vehicles undergoes a mid-model makeover during its five-and-a-half to seven year life cycle. (T 230:23-231:2; RX-42, ¶¶2-3). As part of the model change and makeover, MBUSI is manufacturing, maturing and testing hundreds of prototypes of the new vehicle to ensure it meets company standards. (T 232:3-17; RX-41, ¶23; RX-42, ¶5). Those new vehicles are regularly

¹² Historically, MBUSI has built the Mercedes-Benz M-Class, Mercedes-Benz RX-Class, Mercedes-Benz GLE-Class, Mercedes-Benz GLS-Class, and Mercedes-Benz C-Class. (T 229:5-21; RX-42, ¶2). MBUSI currently builds the C-Class and an SUV lineup of the GLS, GLE and the GLE Coupe.

present on MBUSI's production line and throughout the plant. (T 253:23-25; RX-42, ¶3). Accordingly, the *undisputed* evidence is that at all times, in all places of the plant floor, new vehicles not yet released to the public are potentially present. (T 233:2-5; 253:23-25; RX-42, ¶3).

MBUSI goes to great lengths to prevent premature disclosure of new vehicle information, which is the subject of great public and competitor interest. (RX-40, ¶12; RX-42, ¶6). Indeed, websites are dedicated to revealing information and images of vehicles that have not been released to the public. (RX-42, ¶7). The websites often pay persons for pictures or information about new vehicles. (RX-22; RX-42, ¶7). To protect against early disclosure, MBUSI spends hundreds of thousands of dollars on camouflage (which is administered anytime the vehicle leaves the facility), controls entry and exit of persons through security measures, has implemented sophisticated cyber security software and has implemented work rules (including the Policy). (RX-24; RX-41, ¶22; RX-42, ¶8).

Years of work culminate in a new vehicle's market launch. (T 230:16-22). New vehicles and designs are initially released to the public at important automobile shows, which are analogous to Apple events where Apple releases a new version of its iPhone to great fanfare. (RX-42, ¶11). The automobile shows receive extensive coverage from the press and positive press associated with a new vehicle release can be an important catalyst for sales, and vice versa. (RX-42, ¶11). The stakes are extremely high. Daimler will spend hundreds of millions of dollars on a marketing campaign for a new vehicle and tens of millions of dollars on a marketing campaign for a vehicle undergoing a facelift. (RX-41, ¶24; RX-42, ¶4).

Picture taking and video recording can lead to the premature disclosure of sensitive vehicle information. (RX-40, ¶6). For example, during the facts underlying the allegations here, two new models were present at MBUSI -- 292 GLE Coupe and 166 GLS Facelift -- and both

were being built on the *same* assembly line as other models currently released to the public. (T 244:15-20; RX-42, ¶13). Further, the 166 GLS Facelift's new design represented an important rebranding strategy for the vehicle. (RX-42, ¶14). There was great interest in the 166 GLS Facelift, and websites posted secret pictures of the vehicle. (RX-22; RX-42, ¶¶6-7). A video recording or picture taken by Mr. Garner, *or anyone on the production floor*, could have inadvertently (or intentionally) contained images of those new vehicles. (RX-42, ¶15). Indeed, *two of CGC's Facebook exhibits contained MBUSI vehicles in the background, which potentially could have been a new model*. (GX-5, GX-12). In today's digital age such a recording or picture could have, in seconds, been shared on social media or with others reaching potentially millions of persons. (RX-40, ¶9).

Just one release of confidential vehicle information (*one picture*) would cause Daimler and MBUSI to suffer great harm. (RX-42, ¶10). Once a picture or video recording is released, the harm caused cannot be undone. (RX-40, ¶9). The risks of disclosure are magnified and exacerbated in a workplace of eight-thousand persons where new vehicles are present at all times. (RX-40, ¶11). The stakes are extremely high. Early disclosure can impact sales of outgoing models and dampens enthusiasm for new models if a vehicle is seen but not available for purchase for an extended period. (RX-40, ¶10(a); RX-42, ¶10). Likewise, it can alert Daimler's competitors to new models and technology, as well as the timing for development and implementation. (RX-40, ¶10). Further, permitting competitors to take pictures can lead to legal liability for collusion. (RX-40, ¶7). Daimler demands MBUSI protect its new vehicle information by, among others, implementing recording and picture taking restrictions. (T 233:6-12, 20-23; RX-40, ¶5). MBUSI, thus, has a compelling interest in ensuring confidential new

vehicle information is not prematurely disclosed, and MBUSI's camera policy is a reasonable, common sense restriction to prevent unauthorized disclosure.

b. Camera Usage Can Lead to the Disclosure of Other Confidential Information.

Confidential information, which provides MBUSI a competitive advantage, is present at all times and in all locations on MBUSI's property. (RX-40, ¶6). MBUSI's Policy reduces the risk that confidential information will be disclosed via video recordings or pictures. (RX-40, ¶5).

In addition to the confidential new vehicle information discussed above, MBUSI's production areas contain confidential processes and specialized tools and equipment.¹³ (RX-40, ¶8). MBUSI has spent hundreds of millions of dollars designing, implementing and perfecting manufacturing processes, tools and equipment that permit vehicles to be made more efficient, safer and more cost effective. (RX-41, ¶5). They provide MBUSI a competitive advantage and would be of great value to competitors. (T 248:1-6; RX-40, ¶10(b)). Indeed, MBUSI employs teams of engineers and quality control employees focused on improving these manufacturing processes with combined salaries in the millions of dollars. (T 247:5-25; RX-41, ¶¶6-7).

Likewise, confidential information about MBUSI's Key Performance Indicators (KPIs) and Safety, Quality, Delivery, Cost and Morale (SQDCM), including metrics about safety (*e.g.*, accidents), quality (*e.g.*, quality defects), delivery information (*e.g.*, line stoppage, production data, delivery requirements), cost (*e.g.*, production waste, late production), and morale (*e.g.*, attendance), are located throughout the facility -- including on group leader desks, on bulletin boards, in Atriums and in the cafeterias. (T 221:19-222:9, 227:11-20, 253:17-22). MBUSI also holds daily, weekly and monthly meetings, including pre-shift meetings, horseshoe meetings,

¹³ ALJ Dawson, in denying MBUSI's motion for protective order, explained that she did not need to know the specific details of the confidential materials, just their categories. (T 17:23-18:6, 19:1-2).

and all Team Member communication meetings, in which sensitive business information is routinely shared and discussed. (T 216:14-220:24). The confidential material and information provides MBUSI a competitive advantage in a highly competitive market, and MBUSI employs a significant number of employees and has invested hundreds of millions of dollars in designing and manufacturing or collecting the aforementioned confidential materials and information. (T 226:11-22; RX-40, ¶12).

The confidential information must be out in the open for ease of access and use/review and is not always marked as confidential. (RX-40, ¶8). It is often not apparent what material is proprietary and what is not; indeed, CGC's witness, who is a seventeen year employee, testified he could not discern what is and is not confidential at the plant and erroneously testified sensitive information about MBUSI's business performance was *not* confidential. (T 101:7-11; 152:16-22; 226:11-16). *One of CGC's Facebook exhibits even contained confidential production information in the background.* (T 271:5-13; GX-6).

In addition to confidential information, MBUSI's atriums also contain MBUSI's health and safety office. (T 253:17-21, 262:6-11). Injured team members are transported to the medical officer and a picture or video recording of an injured person or other persons seeking medical care certainly would be inappropriate and violate personal privacy.

MBUSI's parking lots contain new vehicles not released to the public, which, as discussed above, are highly confidential (see Section III, G(2)(a); T 210:2-5; RX-37, ¶4). Further, MBUSI's security patrols, which help ensure compliance with its FTZ obligations and safety for Team Members, can be observed from the parking lot. (T 261:14-22). Persons with bad motives could, through recording and picture taking, learn MBUSI's security protocols, schedules and potential vulnerabilities, which could compromise FTZ compliance. (T 261:14-

262:2). Further persons with such knowledge could compromise parking lot safety (vandalism, thefts, *etc.*) and security (Team Members are particularly vulnerable when leaving the facility at night when it is dark outside, and female Team Members have been especially sensitive to this issue). (T 130:2-10, 261:14-262:2). Pictures posted on Facebook can also be geo-tagged, which would reveal the exact location where the picture was taken. (T 260:22-261:13).

As discussed above in Section (a), picture taking and video recording can lead to the premature disclosure of sensitive confidential information. Confidential information is everywhere, and disclosure of picture or videos via social media (or otherwise) to competitors or the public would work substantial harm on MBUSI and its parent corporation Daimler. (RX-40, ¶10). Further, MBUSI must ensure it meets its FTZ obligations. (T 210:11-23). Daimler also demands MBUSI protect its confidential information by implementing recording and picture taking restrictions. (T 228:13-19; RX-20, pg. 13; RX-40, ¶5). Most importantly, the up to eight thousand persons present in MBUSI's multi-employer, multi-cultural and multi-lingual facility daily cannot always discern what is and what is not confidential, increasing the likelihood of inadvertent disclosure. (RX-40, ¶11). MBUSI has a compelling interest in ensuring its confidential information is protected, and the Policy protects that interest.

3. The Policy Prevents Interference with MBUSI's Work Culture.

MBUSI's One Team philosophy is an essential part of MBUSI's work culture and provides the company a competitive advantage. (T 258:23-259:10). The One Team philosophy - which emphasizes openness, mutual trust, respect, and teamwork in the workplace (T 258:23-259:10) -- facilitates the honest flow of information, both good and bad, through various team meetings and other communication forums. Team Members speak openly about sensitive personal information, such as medical or family information, and business information. (T 215:2-20, 263:13-16). Included in MBUSI's One Team philosophy is its "open door" policy (T

140:14-19, 146:23-147:9, 215:25-216:13), which makes management always accessible for Team Members to discuss issues. (T 215:25-216:13). MBUSI has determined that the One Team philosophy improves Team Member happiness and morale and improves communication. (T 215:21-216:6, 224:9-11, 247:18-25, 258:23-259:10). It provides MBUSI a competitive advantage. (T 248:4-6).

In addition to the employee relation benefits, open communication enhances productivity. (T 215:21-216:13). Team Members work around each other (each stage of the vehicle production process works in tandem with the next) and often on “teams” and effective communication is part of their job duties. (T 119:15-13, 140:10-19, 258:23-259:10). For example, Team Members must timely communicate potential problems, effectively articulate work issues, and, generally, engage with co-workers about work processes. (T 146:23-147:9) Interference with Team Members’ communication channels, thus, interferes with production. (T 146:18-22).

Video recording at work would interfere with MBUSI’s One Team philosophy. (T 259:15-260:4). Video recording and picture taking are inherently confrontational, and Team Members do not want their pictures posted without their permission on social media. (T 264:3-15). More fundamental, if Team Members are concerned that they are being recorded, it will inhibit the free exchange of ideas, spontaneous and honest dialogue, and the atmosphere of trust that make the One Team Approach successful. (T 259:15-260:4, 263:2-264:15). Team Members would also be less likely to discuss terms and conditions of employment if they suspected they were being recorded. (T 259:15-260:4) MBUSI may not learn about and, thus, will not be able to address concerns, work issues, and problems. (*Id.*) MBUSI has a compelling interest in ensuring successful team relations, and MBUSI’s Policy protects that interest.

H. Experts Explained the Importance of Video Recording and Picture Taking Restrictions in Manufacturing Settings and at MBUSI.

The need for a policy restricting video recording and picture taking in a manufacturing setting is not unique to MBUSI. At the hearing, MBUSI offered the expert testimonies of Sepp Etterer, Bill Petty and Jonathon Halbesleben on the safety, production and team relation justifications, respectively, for a rule restricting video recording and picture taking in a manufacturing setting and at MBUSI. While ALJ Dawson rejected their testimonies as “irrelevant,” that ruling was incorrect (see Section IV, C(2)), and the offers of proof (designated as rejected exhibits) show their expert testimonies are not only relevant, but essential to understanding the critical business interests at stake.

1. Sepp Etterer Explained Recording and Picture Taking Rules Protect Safety.

Based on his experience consulting with employers on safety and on his more than 50 years in the safety industry, Sepp Etterer explained that video recording and picture taking at work create safety hazards. (T 312:15-17; RX-26; RX-43, ¶¶18, 20) Indeed, he was not aware of any manufacturer that permitted video recording or picture taking in work areas. (RX-43, ¶31). He explained that work safety rules are designed to mitigate safety risk, and a work practice that could lead to distraction -- even just a brief distraction -- would be unacceptable if it could lead to serious harm to persons. (RX-43, ¶17). He testified that distractions are the largest cause of workplace injuries in manufacturing environments, causing 70% of all work accidents. (RX-43, ¶¶13, 15). Video recording and picture taking distract (1) workers who are supposed to be working but are using a camera, (2) workers who are supposed to be working but who are being recorded or having their picture taken, (3) workers who are supposed to be working but who observe camera usage and (4) workers who remain concerned over why they were being

photographed or video recorded. (RX-43, ¶19). Camera usage can also lead to disagreements, disputes and even violence as the act is inherently confrontational. (RX-43, ¶19).

Mr. Etterer testified -- in his expert opinion and based on his visit to MBUSI's plant, observance of MBUSI's plant operations, and consultation with Jeff Burbank -- MBUSI should prohibit *all* non-work camera usage in all parts of its plant floor to protect workers' safety. (RX-43, ¶¶11, 24). He also testified that picture taking and video recording on MBUSI's plant floor would lead to preventable hazardous conditions that violate OSHA's safety requirements. (RX-43, ¶27).

2. Bill Petty Explained Video Recording and Picture Taking Rules Protect Production.

Bill Petty testified -- based on his experience consulting with employers on lean manufacturing, his 35 years of manufacturing experience relating to resource and operations management and over 20 years of teaching experience related to the same -- that persons' video recording or taking pictures at work would interfere with lean manufacturing. (T 305:6-8; RX-30; RX-39, ¶22). Lean manufacturing/just-in-time inventory control is a manufacturing technique that emphasizes the elimination of waste, which includes scrap materials, rework, rescheduling materials and setup, and downtime. (RX-39, ¶14). Distractions to employees working, *of even just a few seconds*, are one of the largest causes of interference with lean manufacturing because they lead to mistakes, which cause waste. (RX-39, ¶18). He explained that camera usage at work causes distractions which cause interference with production. (RX-39, ¶22).

Mr. Petty testified -- in his expert opinion and based on his visit to MBUSI's plant, observance of MBUSI's plant operations, and consultation with MBUSI Managers Anthony Gamble and Senior Manager Shawn Gillian -- that MBUSI should prohibit *all* camera usage in

all parts of its plant floor to protect production. (RX-39, ¶¶12, 25). He explained that manufacturing vehicles is one of the most complicated industrial manufacturing achievements, and MBUSI's lean manufacturing system is one of the most sophisticated lean manufacturing systems in the country. (RX-39, ¶¶19-20). Permitting camera usage at MBUSI would cause distractions, which could decrease vehicle quality, increase waste, increase production time, and increase total costs, all of which run counter to lean manufacturing. (RX-39, ¶26).

3. Jonathon Halbesleben Explained Video Recording and Picture Taking Rules Protect Work Cultures.

Expert Jonathon Halbesleben -- who has published nine books about employee well-being and human resource management, has published over ninety peer-reviewed journal articles, is a certified Senior Professional of Human Resources from the Human Resource Certification Institute, has conducted several studies related to employee relations and is a PHD professor at the University of Alabama -- testified that persons using recording devices at work interfere with trust and open communication, which decreases morale, productivity and commitment. (RX-27; RX-44, ¶¶12, 16). He testified that persons who fear they are being recorded will change their behaviors; these persons will be more cautious, less likely to volunteer information, and generally more suspicious of others. (RX-44, ¶17). They also show reduced creativity, increase stress and have cognitive resources diverted from one's ability to focus on a work task. (*Id.*). Mr. Halbesleben cited also to numerous empirical studies reflecting the same, indicating the widespread industry knowledge of the inherent work dangers from recording. (RX-44, ¶18). The negative interference with open communication, in his opinion, is particularly acute in manufacturing settings, where there are high degrees of task interdependence. (RX-44, ¶¶18-19). He also testified that ineffective communications also

interferes with productivity as persons would not communicate about work issue or problems effectively. (RX-44, ¶¶11-12, 15).

Mr. Halbesleben testified -- in his expert opinion and based on his visit to MBUSI's plant, observance of MBUSI's plant operations, and consultation with Jeff Burbank and Human Resource Manager David Olive -- that MBUSI should prohibit *all* camera usage without prior approval because it would be detrimental to MBUSI's strong culture of communication (which is unique, especially for an organization of its size and in a manufacturing environment). (RX-44, ¶¶9, 25). Video recording at MBUSI would inhibit open workplace communication -- interfering with the free exchange of ideas, spontaneous and honest dialogue, and an atmosphere of trust -- lowering workers' morale, productivity, and commitment, which would impact MBUSI as a whole. (RX-44, ¶¶23, 27).

I. Kirk Garner's Offer of Proof Explained the Importance of Video recording and Picture Taking Restrictions at MBUSI.

ALJ Dawson prohibited CGC's only witness Kirk Garner, a seventeen year employee, from testifying about the business needs for the Policy on "relevance" grounds.¹⁴ MBUSI made an offer of proof (designated as a rejected exhibit). (RX-37). Mr. Garner's denied testimony was relevant, and the offer of proof shows Mr. Garner would have testified to the various safety and security risks from picture taking in MBUSI's parking lots, the risk of disclosure of new vehicle information from picture taking in MBUSI's parking lots, and the fact that a narrower version of the Policy would not and could not (1) protect MBUSI's production, (2) protect persons working, (3) protect against the disclosure of MBUSI's propriety and confidential information (including

¹⁴ T 92:2-4, 115:20-116:9, 122:1-4, 122:13-123:13, 131:12-132:4, 134:15-19, 136:1-13, 138:3-6, 152:2-9, 153:16-155:6, 169:17-22, 170:3-10, 174:13-175:1.

early disclosure of new vehicle designs), and (4) foster positive workplace communication consistent with MBUSI's One Team Approach. (RX-37, ¶¶6)

IV. ARGUMENT

A. **Legal Standard for Analyzing Work Rules.**

The sole allegation here is whether the Policy is overly broad in violation of Section 8(a)(1) of the Act. The Supreme Court has held that when analyzing a work rule the Board has the "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy." NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967). Indeed, "[n]ot all conduct that can, in some general sense, be characterized as an exercise of a right enumerated in section 7 is afforded the protection of the Act." Tex. Instruments, Inc. v. NLRB, 637 F.2d 822, 830 (1st Cir. 1981).

In determining whether a work rule violates Section 8(a)(1) of the Act, the Board considers "whether the rule[] would reasonably tend to chill employees in the exercise of their Section 7 rights."¹⁵ Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. mem., Lafayette Park Hotel v. NLRB, 203 F.3d 52 (D.C. Cir. 1999); See also Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004) ("Lutheran Heritage"). To make that determination, the Board balances the Section 7 rights with an employer's business interests, considering extrinsic evidence that includes how employees understand the rule and the employer's business justifications for the rule. The Board does not read a rule in isolation but in the whole context, taking into account

¹⁵ As noted above, neither the unfair labor practice charge nor the Complaint asserts that the work rule explicitly restricts Section 7 rights, that the rule was implemented in response to union activity, or that the rule has been applied to restrict Section 7 rights.

the rule's evident purposes.¹⁶ The "Board has held that Section 7 rights may be outweighed by an employer's substantial and legitimate business justifications."¹⁷

B. The Board Has Held the Business Interests Here Justify a Rule Restricting Section 7 Rights.

The Board has regularly recognized that employer concerns about *potential* interference with (1) safety, (2) production, (3) employee relations or (4) the release of confidential information justifies preventative rules, even if the ancillary effect of those rules is a restriction on Section 7 rights. The Board does not sit to second-guess employer's business justifications for work rules and does not require that employers wait until injury or death, production interference, loss of morale or devastating releases of confidential information before implementing reasonable, common sense rules.

Safety. The Board has long-recognized that protecting safety, *particularly in a manufacturing setting*, justify restrictions on Section 7 rights. For example, in Interbake Foods, LLC & Bakery, 2013 WL 4715677, at *83-86 (NLRB Aug. 30, 2013) (discussed in Section IV, C(1) in more detail) an Administrative Law Judge found a *camera ban in the manufacturing facility (bakery)* lawful because it protected safety, stating the "policy itself expresses valid, nondiscriminatory, rationales for its existence" and noting that "of course, the most obvious is the concern for safety and health which could be adversely affected by distractions created by use of these devices." Similarly, in Albis Plastics, 335 NLRB 923, 924 (2001) the Board upheld a ban on union stickers, stating "when an employer demonstrates, based on the conditions of the workplace, that curtailing the employees' right to display union insignia is necessary to its safety

¹⁶ Lutheran Heritage, 343 NLRB at 646 (citing Lafayette Park, 326 NLRB at 825, 827) (the Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.").

¹⁷ Sci-Atlanta, Inc., 278 NLRB 622, 625 (1986) citing Int'l Bus. Machines Corp., 265 NLRB 638 (1982).

objectives, the Board will dismiss allegations that the ban is unlawful.” These two decisions are in keeping with a long line of cases highlighting the importance of workplace safety rules and their primacy over Section 7 rights.¹⁸ Safety concerns are heightened in manufacturing operations. Notably, in E. Omni Constructors, Inc. v. NLRB, 170 F.3d 418, 425-26 (4th Cir. 1999), the Court, reversing the Board, found lawful a rule prohibiting employees from placing decals on hard hats because of safety concerns. In doing so, the Court noted that “[t]he potential for serious injury at EOC, as with most industrial facilities, is self-evident” and highlighted that the “EOC was not required to wait until an employee was electrocuted before instituting a ban on non-company authorized decals on hardhats” and could instead implement the rule as “[a]ll that is required is that ... valid safety considerations justified the ban.” (citations omitted). Safety concerns justify restrictions in parking lots as well.¹⁹

Production. The Board has also long-recognized that protecting production justifies restrictions on Section 7 rights. Employers “have the right to take reasonable steps to ensure full and safe production of their product,”²⁰ and “[i]t is the main production areas of an employer’s

¹⁸ See Sam’s Club, 349 NLRB 1007, 1011 (2007) (reversing the ALJ and finding lawful the employer’s ban on all non-breakaway lanyards because the employer had a legitimate concern that the lanyards might lead to worker injury after noting that “breakaway lanyards may prevent injury to employees” and that although “no such injury has yet occurred” that “does not diminish the legitimacy of the Respondent’s desire to prevent such an occurrence or of its insistence... to achieve that purpose.”) (internal citations omitted); UARCO, Inc., 286 NLRB 55, 69 (1987) (legitimate safety concerns warranting distribution ban where Hysters “sometimes” delivered parts because “leaflet recipients were apt to stop and read the leaflets at points of travel extending into the Hyster path and thus be distracted from these oncoming vehicles”).

¹⁹ Target Corp., 359 NLRB 953, 954-55 (2013) (the Board upheld the employer’s parking lot policy, which, among other things, stated “[i]f you see people you don’t know loitering around the team member parking area, notify Assets Protection or your leader on duty immediately” because it protected safety in the parking lots); Macerich Mgmt. Co., 345 NLRB 514, 516 (2005) (ban of signs in parking lot lawful because company “has a legitimate concern in ensuring the safety of its patrons and, to that effect, protecting them from being struck and possibly injured by a sign in an enclosed area.”); Tempco MFG. Co. Inc., 177 NLRB 336 (NLRB 1969) (the Board affirmed the ALJ’s determination that a “no-loitering” rule in the company’s parking lot was lawful because it was implemented for a legitimate business reason).

²⁰ Kendall Co., 267 NLRB 963, 965 (1983) (noting that “a rule which curtails that employee right is presumptively invalid unless special circumstances exist which make the rule necessary to maintain production or

facility where...maintaining order [is] paramount.”²¹ For example, in Timken Co., 236 NLRB 757, 764-65 (1978), the Board upheld a distribution ban close to a production area because distribution could interfere with production. Likewise, in Wash. Fruit & Produce Co., 343 NLRB 1215, 1233 (2004), the Board upheld a ban on distribution on an aisle because it was close to a work area and could have led to interference with production. Moreover, in Peyton Packing Co. Inc., 49 NLRB 828, 843 (1943), the Board upheld a no-solicitation rule barring solicitation during working time after noting that an employer’s interest in production during working time outweighs Section 7 rights of employees to engage in solicitation. These cases are but a handful of the myriad of instances in which concerns for production have trumped Section 7 rights.²²

One Team Approach. The Board has recognized that an employer can limit or prohibit Section 7 rights if necessary to, among others, “ensur[e] harmonious employee relations.” In Re the Guard Publ’g Co., 351 NLRB 1110, 1137 (2007) (internal citations omitted) accord Stephens Media, LLC, 356 NLRB 661, 678 (2011); see also NLRB v. I.V. Sutphin Co.-Atlanta, Inc., 373 F.2d 890, 893 (5th Cir. 1967) (noting that “[t]he [National Labor Relations] Act does not insulate

discipline or to ensure safety,” the Board found Respondent’s dress code policy justifiable based on safety considerations.).

²¹ Found. Coal W., Inc., 352 NLRB 147, 150 (2008).

²² See Patio Foods v. NLRB, 415 F.2d 1001, 1003 (5th Cir. 1969) (noting that when “in considering whether the plant manager was entitled to order [employees] to cease distribution in the truck loading area in the first place, we are concerned with potential rather than actual distraction” and “conclude[ing] that [employer’s] interest in cleanliness, order, and discipline in a work area where employees are working justified the general manager’s prohibition of handbilling in that area”); Fabri-Tek, Inc. v. NLRB, 352 F.2d 577, 585-86 (8th Cir. 1965) (employer could restrict “activities which disrupt, or tend to disrupt production”); Caterpillar Tractor Co. v. NLRB, 230 F.2d 357, 359 (7th Cir. 1956) (potential interference with production sufficient to justify limitation on Section 7 rights); NLRB v. St. Francis Healthcare Ctr., 212 F.3d 945, 958 (6th Cir. 2000) (finding that “[a]n employer may restrict employees from wearing union insignia if it can demonstrate special circumstances that require the restriction to maintain production and discipline.”) (internal citations omitted); Davison-Paxon Co. v. NLRB, 462 F.2d 364, 368 (5th Cir. 1972) (reversing Board, finding special circumstances because the Union pins created a danger of disruption on the selling floor).

an employee from discharge for engaging in conduct disruptive of harmonious employee relations.”) (internal citations omitted), accord, Trailmobile Div., Pullman Inc. v. NLRB, 389 F.2d 195, 197 (5th Cir. 1968). Even more, in industrial settings, employers have important interests in effective employee communications because it protects production and quality.

Confidential Information. The Board has recognized that protecting confidential information justifies restrictions on Section 7 rights. For example, in In Re Mediaone of Greater Fla., Inc., 340 NLRB 277, 279 (2003), the board noted that “[c]learly, businesses have a substantial and legitimate interest in maintaining the confidentiality of proprietary information.” Indeed, the Board in Flagstaff Med. Ctr., 357 NLRB 659, 662-63 (2011) (discussed in Section IV, C(1) in more detail) recognized just how important confidentiality can be as it found a ***camera ban lawful*** solely because it protected patients’ confidentiality interests. Likewise, in Int’l Bus. Machines Corp., 265 NLRB 638 (1982), the Board found lawful an employer’s policy of not informing employees of their coworkers’ wage data because confidentiality concerns constituted “substantial and legitimate business justifications for its policy,” such that the employees’ interests did not “outweigh the [employer’s] legitimate business interests in support of its [confidentiality] policy.” Moreover, the Board has regularly found rules precluding disclosure of information about investigations lawful, even if they infringes upon Section 7 rights, because of the need to protect confidentiality.²³

C. MBUSI’s Business Interests Justify the Policy.

1. The Policy Protects Important Business Interests and is Lawful Under Board Precedent.

²³ See e.g., Desert Palace, Inc., 336 NLRB 271, 272 (2001) (finding confidentiality requirement for investigation lawful because of employer’s legitimate business reasons, even if the rule intruded upon employees’ exercise of Section 7 rights); Hyundai Am. Shipping Agency, Inc., 357 NLRB 860, 873-74 (2011) (an employer can justify a rule prohibiting employee discussions of ongoing investigations for legitimate business reasons, even if it intrudes upon employees’ exercise of Section 7 rights).

The Policy protects legitimate and important business interests that the Board has regularly recognized trump Section 7 rights, including the peripheral Section 7 rights here.²⁴ Indeed, the Board and the ALJ have already found the business interests here *separately* -- namely protecting confidential information and protecting communication and safety interests, respectively -- justify camera usage bans.²⁵ Certainly MBUSI's business interests *collectively* justify its Policy. Context matters in MBUSI's complex manufacturing environment of thousands of persons.

Camera bans or usage permission rules have been found -- post Lutheran Heritage -- lawful based on the employer's specific business justifications. Each case requires an individual analysis. For example, in Flagstaff Med. Ctr., the Board found that the employer's rule *prohibiting* photography on hospital property was lawful, despite the potential infringement on Section 7 rights. 357 NLRB at 663. The Board explained that "the privacy interests of hospital patients are weighty," and the employer had a "significant interest in preventing the wrongful disclosure of individually identifiable health information, including by unauthorized photography." *Id.* Based solely on the *potential* disclosure of confidential information, the employer was permitted to lawfully ban photography campus wide, even outside patient areas and other areas where the risk of disclosure of patient information would be low. *Id.* Likewise, in Interbake Foods, LLC, the Administrative Law Judge found that the employer, *in an industrial*

²⁴ MBUSI disputes that camera usage is a Section 7 right. Indeed, it was not until 2015, in Rio All-Suites Hotel & Casino, 362 NLRB No. 190 (2015), that the Board conclusively made clear that picture taking and video recording implicated Section 7 rights. MBUSI contends that case was wrongly decided and picture taking and recording does not implicate Section 7 rights.

²⁵ ALJ Dawson denied a protective order which would was necessary for MBUSI to proffer substantial evidence about its confidential information. (T 19:1-2). It was error for ALJ Dawson to deny the protective order. MBUSI was ready to provide substantial evidence of the various and unique confidential processes, products, tools and equipment present at its plant. Denial of the protective order prejudiced MBUSI's interests and its ability to present its case.

baking setting, lawfully prohibited the use and possession of recording devices in the workplace, despite the potential infringement on Section 7 rights. 2013 WL 4715677, at *72-86 (NLRB Aug. 30, 2013). The Administrative Law Judge concluded that the business interests in the industrial work place for the no cell phone and recording device rule -- keeping the lines of communication open and to ensure the health and safety of all employees (“Of course, the most obvious is the concern for safety and health which could be adversely affected by distractions created by use of these devices”) -- were valid and “entirely reasonable” and outweighed any Section 7 rights implicated. *Id.* at 72.

Here, MBUSI’s significant business interests are even more compelling than the confidential information interests in Flagstaff or the communication and safety interests in Interbake. The Policy protects MBUSI’s interests in: (1) its efficient production system to provide high quality vehicles; (2) providing a safe work place; (3) the efficient operation of its One Team system, which creates harmony and employee relations and leads to more efficient production and better quality; and (4) its confidential information, which is present at all times throughout its facility. Specifically,

- ***Confidential information at the facility.*** Confidential information is everywhere at all times, including the plant floor, parking lots, Atriums and the cafeteria.
- ***Confidential information discussed in meetings.*** On a daily basis sensitive and confidential information is discussed in various meetings.
- ***Confidential new vehicle information.*** At all times new vehicles that have not been disclosed to the public are present on MBUSI’s plant floor and in its parking lots.
- ***Safety.*** The work setting and parking lots are busy and potentially dangerous to inattentive employees. Employees work and move in the facility in close proximity to moving vehicles and other mechanized equipment, and the risk of significant harm, even death, can occur to those distracted.

- ***Crime to Persons and Property.*** MBUSI's parking lots handle thousands of persons twenty-four hours a day and the risks of vandalism, thefts, *etc.* and crimes to persons is always a risk, particularly if potential security vulnerabilities are identified through recording or picture taking (*e.g.*, security patrol timings, locations (through geo-tagging of pictures)).
- ***Production.*** Production mistakes from distraction are costly and unacceptable. Mistakes cost MBUSI millions of dollars annually and interfere with vehicle quality.
- ***One Team Approach.*** MBUSI's One Team approach is critical to its competitive position and is built upon the concept of open communications. Interference with open communication negatively impacts employee interactions and productivity.
- ***Business obligations.*** If MBUSI fails to protect Daimler's confidential information and comply with its rules, it will be less competitive when seeking new business from Daimler. MBUSI may also lose some or all of its current production contracts. Further, MBUSI must comply with its FTZ obligations.

Vital business interests are at stake for MBUSI. Both the ALJ and CGC recognized that MBUSI has important business interests at stake. (T 19:3-9, 20:8-10, 21:1-4). The undisputed evidence is that camera usages would interfere with those business interests. (See Section III, G). The Board has regularly held that protecting the interests here (*e.g.*, production, safety, confidential information and employee relations) justifies rules restricting Section 7 rights. (see Section IV, C(1)). Indeed, the Board and an ALJ in Flagstaff and Interbake, respectively, have found protecting confidential information (Flagstaff) and safety and employee relations (Interbake) *separately* justified camera bans. Certainly MBUSI's interests *collectively* justify its Policy.

2. The Experts' Testimony is Relevant and Necessary.

ALJ Dawson found the experts' testimonies irrelevant, but the testimonies of Sepp Etterer, Bill Petty and Jonathon Halbesleben -- on the safety, production and team relations justifications, respectively, for the Policy -- are not only relevant, but essential. Their testimonies (1) explain the business risks from camera usage that are not common knowledge,

(2) show the vital business interests at stake and (3) provide **evidence** that rebuts CGC's **argument** not supported by evidence that the rule could be more narrowly tailored.

First, expert testimony assists the trier of fact if it “logically advances a material aspect of the proposing party’s case.” Daubert v. Merrell Dow Pharm., Inc. (Daubert II), 43 F.3d 1311, 1315 (9th Cir. 1995). Here, the unique safety, production and team relation issues present in an advanced manufacturing setting of thousands of persons are certainly not common knowledge. Indeed, Mr. Garner, a seventeen year employee, did not understand them, and there is no evidence otherwise. (See Section IV, D(1); T 101:7-11). Further, the Board does not have particular expertise in safety and OSHA compliance, lean manufacturing and communication best practices.²⁶ The experts make clear the nuances and complications camera usage causes in industrial settings. The also made clear that their respective industry recognizes the dangers from picture taking.

Second, the expert testimonies explained the important business interests at stake. The expert testimonies of leaders in their respective fields establish the critical business justifications for the Policy -- which go to the heart of this case -- therefore, it is confounding that their testimonies were found “irrelevant.” To the extent the ALJ determines that any of MBUSI’s proffered business reasons for the Policy are speculative or conclusory, rejecting the experts’ testimonies become even more confounding.

Third, the expert testimonies directly rebut CGC’s anticipated argument that the Policy could be narrowly tailored while still protecting MBUSI’s business interests (despite not having any evidence supporting his argument). The expert testimonies show that the Policy could not be

²⁶ See e.g., S. New England Tel. Co. v. NLRB, 793 F.3d 93, 97 (D.C. Cir. 2015) (the Board’s “expertise is surely not at its peak in the realm of employee-customer relations”).

narrowly tailored.²⁷ All three experts testified a complete ban (or a permission rule) is necessary to protect MBUSI's business interests. Their testimony also makes clear that their respective industry would recognize the inherent dangers from camera usage and that a narrower rule cannot be drafted here. CGC's argument that MBUSI's important business interests would still be protected under a (unidentified and unexplained) narrower policy contradicts the experts' testimonies and evidence that those business interests would not be. Clearly, evidence trumps argument not supported by evidence.

No basis exists for finding that the expert testimonies were "irrelevant." When the testimonies are given their proper weight and the industry standards are considered, they show that the Policy is not only appropriate, but also properly tailored to (1) protect employees from being injured, maimed or worse while at work and ensure compliance with OSHA's requirement; (2) ensure lean manufacturing principles and that vehicles are manufactured without mutilation or production delays; and (3) preserve a work culture that provides MBUSI a competitive advantage. Stated differently, it shows that MBUSI's Policy is lawful.

3. Kirk Garner's Testimony was Relevant and Necessary.

ALJ Dawson found portions of Mr. Garner's cross examination irrelevant, but his testimony is highly relevant. His testimony would have supported the compelling business interests at stake in MBUSI's parking lots, how picture taking could interfere with persons at work and that a narrower version of the Policy would not, and could not, protect MBUSI's interests. (RX-37, ¶¶1-2, 4, 6). His testimony would not represent a "legal conclusion", as CGC argued in addition to relevance, but simply his informed opinion -- based on his first-hand

²⁷ He may even contend the risks to MBUSI from camera usage have been overstated (despite no evidence supporting that argument), but the expert testimony shows they are not.

knowledge and seventeen years working at MBUSI -- that it would not be possible for the Policy to be narrowly tailored while still protecting MBUSI's interests.

D. The Policy is Properly Tailored to Its Business Justifications.

Board precedent establishes that the scope of a permissible rule is dictated by the business justifications at stake. Context matters. The undisputed evidence establishes that MBUSI has compelling business interests at all times in all parts of its facility, warranting broad protections consistent with Flagstaff and Interbake. A narrower rule would not protect MBUSI's business interests. This case is distinguishable from the Board decisions in T-Mobile USA, Inc., 363 NLRB No. 171, slip op. at 3 (2016) ("T-Mobile"), Whole Foods Mkt., Inc., 363 NLRB No. 87 (2015) ("Whole Foods"), Rio All-Suites Hotel & Casino, 362 NLRB No. 190, slip op. at 4 (2015) ("Rio") which involved (1) retail settings and (2) the only business justification was concern with employee and customer relations.

1. A More Narrowly Tailored Rule Would not Protect MBUSI's Business Interests.

CGC will assert MBUSI should have adopted a narrower rule, but this begs the question: *How could the Policy be drafted narrower yet still protect the substantial business interests at stake?* It can't; therefore, CGC has not met *his burden* to show the Policy was unlawful. Business interests needing protection are everywhere and present twenty-four hours a day. A rule carving out exceptions would be unworkable.

First, the undisputed evidence shows that important business interests needing protection are in all parts of the property at all times. The undisputed evidence establishes that a geographic or temporal restriction would leave those interests unprotected.

Second, the undisputed evidence shows that a "carve out" for specific types of conduct would not work at MBUSI. Any carve out would infringe on MBUSI's business interests. Here,

for example, Mr. Garner sought to take pictures of a Team Member working on the production floor,²⁸ but that desire does not supersede MBUSI's business interests to prevent Mr. Garner's injury (distracted while taking pictures), injury to others (distraction from observing picture taking), interference with production (distraction from observing picture taking) or disclosure (even inadvertent) of confidential information (*two new vehicles were on the production floor at the time*).

Third, the undisputed evidence shows context matters. MBUSI's industrial, fast moving workplace of thousands of persons creates unique issues. Indeed, as Mr. Burbank explained, thousands of persons present daily cannot discern the myriad of circumstances in which picture taking or video recording could interfere with MBUSI's business interests. (T 263:2-264:24). CGC's sole witness, a seventeen year employee, admitted (1) he would not know how to identify confidential information in the plant, (2) he would not know whether video recording would interfere with MBUSI's One Team Approach, (3) he was not sure if being "distracted" at work could interfere with safety (which is incredible) and (4) testified that distractions may not interfere with production if employees just "multitask[ed]" (which is telling because it shows a deep and fundamental misunderstanding of lean manufacturing and the production risks at stake). (T 101:7-11, 117:13-24, 149:18-24). Further, CGC's Facebook exhibits contained images of MBUSI's equipment and vehicles (which could have contained confidential information) and contained *confidential* business charts; clearly, those persons who posted the pictures didn't understand the important business interests at stake, either. The widespread and varied problems that can arise -- particularly in a large manufacturing facility with thousands of employees -- make a requirement that unfettered camera usage be permitted if

²⁸ His alleged to desire to document "a ULP" is nonsensical (being out of uniform is not unlawful) and there is no Section 7 right to collect evidence for "a ULP" that does not even exist.

the activity could *conceivably* implicate Section 7 rights unworkable; *if a seventeen year employee does not understand when camera usage could interfere with MBUSI's important business interests, how can MBUSI expect the other 8,000 persons present on a daily basis to do so? There is simply no counter evidence that GCG can rely upon, except his say-so – which is not evidence and proves nothing.* Any carve out policy would jeopardize MBUSI's business interests, which MBUSI is not required to do.

MBUSI's business interests are particularly compelling because the stakes are so high. Mistakes, *even just one*, could lead to devastating consequences. Persons could be injured, maimed or worse. MBUSI could lose tens of thousands of dollars, or more, from interference with production or quality. Confidential Information jeopardizing entire product launches could be revealed. Competition advantages in production processes that MBUSI spent millions of dollars creating could be lost to public knowledge. Products could be stolen and Team Members even subject to crime in the parking lots day and night. The mistakes cannot be undone. Accordingly, MBUSI's rule is properly tailored to its business interests.

2. Board Precedent Dealing with Different Business Justifications is Not Applicable.

CGC will presumably rely upon T-Mobile, Whole Foods and Rio. However, those cases are inapplicable here because they dealt with different work environments and different business interests rule.

In Whole Foods the Board rejected the grocery store's business justification argument that the challenged camera usage permission rule was necessary to preserve its "speak up and speak out" culture, stating that while Whole Food's "business justification is not without merit . . . it is based on relatively narrow circumstances, such as annual town hall meetings and termination-appeal peer panels." 363 NLRB 87 at 4. In T-Mobile USA, Inc. the Board rejected

the retail store's business justification argument that the camera usage rule was justified by its general interest in maintaining employee privacy, promoting open communication and preventing harassment. 363 NLRB 171, slip op. at 5. In Rio All-Suites Hotel & Casino the Board rejected a casino's business justification argument that the challenged camera usage permission rule was necessary to preserve patron privacy. 362 NLRB 190, slip op. at 4.

Those Board decisions clearly dealt with different physical settings and business interests than MBUSI's.²⁹ First, a grocery store, retail store or casino does not contain employer confidential information or raise manufacturing and safety concerns. Indeed, the employers did not even contend so. Second, MBUSI's business interests are fundamentally different -- and more compelling -- than the interests that the employer articulated in those cases. Those employers sought to protect employee and/or customer privacy, promote open communication and/or prevent harassment. While MBUSI has similar interests, MBUSI also has safety, production and confidential information interests that were simply not present in those other cases. As previously discussed, MBUSI manufactures vehicles in an over six million square foot facility that has up to eight thousand persons present daily and implements a work rule to, among others, help prevent against grievous injury and even death, protect a billion dollar manufacturing operation and protect against disclosure of its proprietary and confidential information in which MBUSI and its parent corporation Daimler have invested billions of dollars. MBUSI's unique business obligations and interests have no parallel to a grocery store,

²⁹ In Verizon Wireless, 2017 WL 2305437 (May 25, 2017), ALJ Dawson concluded that a retail company's rule prohibiting employees from unauthorized recording, photographing or videotaping without permission was unlawful. Judge Dawson rejected the employer's business justification defenses that a permission rule "promotes open communication and dialogue" and the employer's state law compliance argument because the rule applied in states with laws that did not prohibit secretive recordings. Again, the employer did not proffer safety, production or employer confidential information as business justifications for its policy. Further, the employer did not show promoting open communications protected production concerns.

retail store or casino; Whole Foods, T-Mobile, and Rio have no cause to grapple with those obligations and interests. They are, therefore, inapposite here.³⁰

E. If MBUSI's Work Rule is Unlawful, Lutheran Heritage Ignores Employer's Business Interests and Should be Overruled or is Not Applicable to this Situation.

In the event it is determined that MBUSI's work rule is unlawful under Lutheran Heritage, the analytical framework used for determining whether a work rule violates the Act must be reconsidered or, at the very least, one must reconsider its application to this case.

If MBUSI's camera rule's business justifications are insufficient under the Lutheran Heritage test, then that test fails to adequately weigh important interests underlying employer policies and should be overruled as contrary to Board and Supreme Court precedents. As Member Miscimarra recently observed in his well-reasoned and compelling dissent in William Beaumont Hosp., "[t]he 'reasonably construe' standard [in Lutheran Heritage] entails a single-minded consideration of NLRA-protected rights, without taking into account the legitimate justifications of particular policies, rules and handbook provisions. This is contrary to Supreme Court precedent and to the Board's own cases." 363 NLRB No. 162, slip op. at 8 (Apr. 13, 2016) (Member Miscimarra, dissenting);³¹ Great Dane Trailers, Inc., 388 U.S. at 33-34, (the Board has the "duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy."). If MBUSI's business interests

³⁰ They were also wrongly decided.

³¹ MBUSI also adopts Member Miscimarra's other criticisms of the Lutheran Heritage test, specifically that it: (i) requires employers to "correctly anticipate and carve out every possible overlap with NLRA coverage;" (ii) "invalidates facially neutral work rules solely because they are ambiguous in some respect;" (iii) "does not permit the Board to differentiate between and among different industries and work settings, nor does it permit the Board to take into consideration specific events that may warrant a conclusion that particular justifications outweigh a potential future impact on some type of NLRA-protected activity;" and (iv) "has defied all reasonable efforts to make it yield predictable results." 363 NLRB No. 162, slip op. at 8-9.

are insufficient here, then the current legal framework gives the phrase "business interest" no meaning. Consequently, the Board should adopt Member Miscimarra's reasoning and conclusion in his dissent in William Beaumont Hosp.

In the alternative, the analytical framework provided in Desert Palace, 336 NLRB 271, not the Lutheran Heritage test, should apply. In Desert's Palace, the Board implicitly rejected the Lutheran Heritage test and instead applied a proper balancing test:

We agree with the judge that employees have a Section 7 right to discuss discipline or disciplinary investigations involving fellow employees. We also agree that the Respondent's rule prohibiting discussion of the on-going drug investigation adversely affected employees' exercise of that right. It does not follow however that the Respondent's rule is unlawful and cannot be enforced. The issue is whether the interests of the Respondent's employees in discussing this aspect of their terms and conditions of employment outweighs the Respondent's asserted legitimate and substantial business justifications.

Id. at 272; Philips Elecs. N. Am. Corp., 361 NLRB No. 16 at 3 (2014) ("An employer violates Section 8(a)(1) when it prohibits employees from speaking with coworkers about discipline and other terms and conditions of employment absent a legitimate and substantial business justification for the prohibition."); Lucky Cab Co., 360 NLRB 271, 272 (2014) (same). Thus, Board precedent establishes that a workplace investigation confidentiality rule is permitted on a case-by-case basis, even if the rule impedes rights protected under Section 7 of the Act. Consistent with Desert Palace, Philips Elecs. N. Am. Corp. and Lucky Cab Co., here, the Board should permit MBUSI to promulgate a rule which entitles the company to make camera usage decisions on a case-by-case basis.

V. CONCLUSION

For all the foregoing reasons, MBUSI respectfully urges the ALJ to dismiss the Complaint in its entirety.



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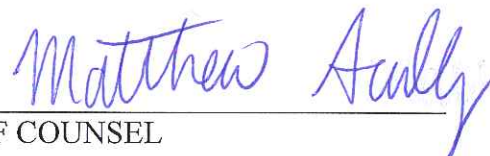
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed with the NLRB via Electronic Filing, a copy has also been served via email and/or U.S. First-Class Mail on the following, on this the 1st day of December, 2017:

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